

STATE OF MICHIGAN
COURT OF APPEALS

WALTER KUSPA,

Plaintiff-Appellant,

v

COMMERCIAL CARRIERS, INC.,

Defendant-Appellee.

UNPUBLISHED

April 16, 1999

No. 205615

Wayne Circuit Court

LC No. 97-705590 CZ

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. We affirm.

Plaintiff was employed by defendant from 1990 through 1995, most recently as a truck driver. On May 31, 1995, while on duty, plaintiff was stopped by an Indiana state trooper and given a breathalyzer test. The test results indicated a blood alcohol level of 0.03, and plaintiff was ticketed. Prior to taking the breathalyzer test, plaintiff had gargled with Listerine, which has an alcohol content of 26.9%. Due to plaintiff's receipt of the Indiana ticket, defendant concluded that plaintiff had consumed intoxicating beverages while on duty, and it terminated plaintiff's employment the following day. Defendant refused to reinstate plaintiff after receiving an explanatory letter from his periodontist, and after an Indiana court dismissed the citation upon receipt of a similar letter. Plaintiff filed a grievance through the International Brotherhood of Teamsters Local 299, but the grievance panel upheld his discharge.

Plaintiff filed suit pursuant to the Persons with Disabilities Civil Rights Act ("PDCRA"),¹ MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, alleging that defendant had discharged him because of a handicap in violation of MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). Plaintiff alleged that his periodontal condition is a "handicap" under MSA 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A) because it substantially limits one or more of his major life activities and is unrelated to his ability to perform the duties of his truck driving position. Plaintiff argued that because the false positive reading on the breathalyzer test was caused exclusively by his treatment for periodontitis, defendant violated the

PDCRA when it discharged him on that basis and when it refused to reinstate him once it learned of his handicap and treatment.

Plaintiff now contends that the trial court erred in granting summary disposition in favor of defendant. Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10). Although the trial court did not specify in its opinion and order the grounds on which it was granting defendant's motion, the court concluded that plaintiff failed to plead a prima facie case. Therefore, it is clear from the record that the decision was based on MCR 2.116(C)(8). Appellate review of decisions regarding motions for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Kuhn v Secretary of State*, 228 Mich App 319, 323-324; 579 NW2d 101 (1998). The court must accept all factual allegations in support of the claim as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion must be granted if no factual development could justify the plaintiff's claim for relief. *Spiek, supra* at 337.

To prove a discrimination claim under the PDCRA, the plaintiff must prove that (1) he is handicapped as defined in the act, (2) the handicap is unrelated to his ability to perform his job duties, and (3) he has been discriminated against in one of the ways delineated in the statute. *Chmielewski v Xermac, Inc.*, 457 Mich 593, 602; 580 NW2d 817 (1998). Under the approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973), the threshold inquiry is whether the plaintiff has established a prima facie case of discrimination. *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998). To establish a prima facie case of discrimination, the plaintiff must produce enough evidence to create a rebuttable presumption of discrimination. *Id.*

The PDCRA defines "handicap" as follows:

[a] determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . *substantially limits* 1 or more of the *major life activities* of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or . . . is unrelated to the individual's qualifications for employment or promotion. [MSA 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A) (emphasis added).]

Michigan courts look to the Americans with Disabilities Act ("ADA"), 42 USC 12101 *et seq.*, the Vocational Rehabilitation Act, 29 USC 701 *et seq.*, the regulations promulgated under these acts, and the federal courts' treatment of them for guidance in interpreting the terms "substantially limits" and "major life activity" under the PDCRA. See *Stevens v Inland Waters, Inc.*, 220 Mich App 212, 216-217; 559 NW2d 61 (1996). This Court has adopted certain definitions and holdings promulgated by the federal courts for purposes of interpreting the PDCRA:

[M]ajor life activities [are defined] as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. . . . Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect. [*Stevens, supra* at 217-218.]

Using these guidelines, it is clear that periodontitis is not a “handicap” under the PDCRA. Plaintiff is not substantially limited in his ability to care for himself, perform manual tasks, walk, see, breathe, learn, or perform other related activities. The Michigan Supreme Court has recently cautioned the lower courts against finding a “handicap” in a “commonplace and relatively benign and easily remedied” condition:

We note that federal courts interpreting similar language in the Rehabilitation Act, the precursor of the ADA, have noted that the high purpose of the act of assuring that truly disabled yet capable individuals are protected from discrimination would be debased if the statute’s protections could be invoked by relatively minor and commonplace impairments. . . . To protect against this, the ADA and the HCRA include the requirement that an individual have a condition that substantially limits a major life activity. These words have real meaning. They set the standard for determining which conditions will meet the definition and which will not. By limiting the HCRA’s protection to individuals having conditions that actually impose substantial limitations, the standard preserves the high purpose of the act. [*Chmielewski, supra* at 609.]

Accordingly, the trial court did not err in holding that plaintiff had failed to plead a prima facie case under the PDCRA because he is not “handicapped” under the Act.

Moreover, even assuming that plaintiff’s complaint established the “handicap” element of a prima facie case under the PDCRA, summary disposition was appropriate nonetheless. The plaintiff in a handicap discrimination case has the burden of proving as an element of the prima facie case that the employer discharged him *because of the handicap*; that is, that the defendant acted with discriminatory intent. *Chmielewski, supra* at 617; *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 574; 579 NW2d 435 (1998). Plaintiff has not alleged any facts showing that he was discharged because of his periodontitis. Rather, paragraph 15 of the complaint acknowledges that plaintiff was terminated by defendant because of defendant’s conclusion, whether erroneous or correct, that plaintiff had consumed intoxicants while on the job. Therefore, plaintiff has failed to establish a prima facie case under the PDCRA as he has not pleaded facts that show that defendant discriminated against him because of his alleged handicap. Accordingly, summary disposition pursuant to MCR 2.116(C)(8) was proper.

Affirmed.

/s/ Roman S. Gibbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

¹ The Michigan Handicappers' Civil Rights Act, MCL 37.1101; MSA 3.550(101), was amended by PA 1998, No. 20, effective March 12, 1998, and shall now be known and cited as the Persons with Disabilities Civil Rights Act.